

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PROTECH MINERALS, INC., a
California Corporation, and CHUL LIM
CHOE, an individual

Petitioners/
Counter-
Defendants,

vs.

TERRY SUZUKI,

Respondent/
Counter-Plaintiff

No. 2:20-cv-00969-TSZ

RESPONDENT TERRY SUZUKI'S
OPPOSITION TO PETITION TO VACATE
ARBITRATION AWARD
AND
CROSS-MOTION TO CONFIRM
ARBITRATION AWARD AND FOR AN
AWARD OF ATTORNEY FEES AND
COSTS

NOTE ON MOTION CALENDAR:
October 2, 2020

I. INTRODUCTION AND RELIEF REQUESTED

Suzuki moves for an order confirming an arbitration award in his favor and for denial of Choe's motion to vacate that award. Because Choe's motion is based on factual disagreements with the arbitrator and the Federal Arbitration Act does not allow this Court to review the arbitrator's factual findings, this Court must deny Choe's motion and confirm the award.¹

II. FACTS

The Arbitrator found that Suzuki proved his case.

On April 18, 2020, Arbitrator Thomas McPhee entered a Corrected Final Award in the case of *Terry Suzuki v. Protech Minerals, Inc., and Chul Lim Choe*, JAMS Arbitration No. 1160021925, incorporating several earlier interim awards and decisions.² In the arbitration, Suzuki sought to enforce the payment terms of a Consulting Agreement he had with Choe and Suzuki "proved the elements of his claim."³ Because Choe does not challenge the extensive findings underlying that decision, they will not be discussed in detail.

Choe failed to prove his affirmative defense.

Choe asserted "a laundry list of affirmative defenses," Including that Suzuki was prohibiting by California law from being paid under the Consulting Agreement because

¹ This brief encompasses both Suzuki's motion to confirm and Suzuki's opposition to Choe's 15-page petition to vacate. Dkt. 1.

² Dkt. 1-1 at Exs. E, H, I, and J and Declaration of Jack M. Lovejoy, Ex. 1.

³ Id. at 82, 84.

1 he did not hold a real estate or securities license.⁴ Choe “failed to prove any of the
2 affirmative defenses.”⁵

3 In 2015, Choe was in the process of offering PMI for sale. A man named Pastor
4 Shin was helping Choe find a buyer. Pastor Shin repeatedly asked Suzuki to help before
5 Suzuki agreed to “scout for a potential buyer.” Suzuki contacted Mike Mattox in March
6 2016. Mattox was interested but insisted that the sale include an agreement with an
7 operator who would run the mining business after the asset sale. On March 15, Choe,
8 Pastor Shin, and Suzuki agreed that Suzuki would work to become the on-site manager
9 Mattox demanded and discussed Suzuki’s compensation. After March 15 Suzuki was a
10 consultant who spent time and resources in California learning the PMI business. His
11 activities were

12 not part of the services provided by a licensed real estate broker in a real
13 estate transaction. Those activities far exceed services customarily
14 expected of a real estate broker, but are consistent with the agreement [the
Consulting Agreement] that he would provide assistance in connection
with a sale of the assets of PM.

15 Suzuki’s assistance was a “key part of Mattox’s interest,” specifically his interest in
16 having “an on-site manager.”⁶

17 Through April and May, Suzuki was “messenger and scrivener” for Mattox and
18 Choe, but Mattox and Choe each “made clear that Suzuki did not advise him or
19 negotiate on his behalf.” At the arbitration Choe “professed” to believe Suzuki

20
21 ⁴ Id. at 82.

⁵ Id. at 84.

⁶ See Id. at 87-88 for all statements in this paragraph.

1 represented Mattox. But Choe was the least credible witness and Mr. McPhee inferred
2 that Choe's "professed belief" may be explained by one stray use of the word
3 "negotiated" in Suzuki's notes.⁷ Mr. McPhee did *not* find that Suzuki represented
4 Mattox, nor that he negotiated either side of the transaction.

5 By May 8, 2016, Choe was represented by an attorney who drafted the
6 framework for the final term sheet between Choe/PMI and Mattox. In June, Choe's
7 attorney and Mattox agreed Suzuki had introduced the parties but was not representing
8 anyone. Jennifer Choe also agreed that Suzuki did not represent Choe. Suzuki had no
9 role in the Letter of Intent between Choe and Mattox. Choe contended that the amount
10 of compensation promised to Suzuki in the Consulting Agreement suggested that
11 Suzuki was being paid as a real estate broker. Mr. McPhee rejected that contention
12 because it did not fit the facts.⁸

13 To avoid tax, Choe used the proceeds from Mattox to buy shares in a Delaware
14 Statutory Trust (DST) for purposes of a 1031 exchange. Choe testified the 1031 exchange
15 and the DST were both proposed and recommended by Suzuki. Mr. McPhee disagreed.
16 Choe was considering a 1031 exchange before Suzuki was involved. The DST became a
17 "part of the discussion" after Choe had already engaged with a securities broker, Dan
18 Uhm. Mr. Uhm explained the DST—Suzuki "did not have a speaking role in the
19 conversation"—and Mr. Uhm brokered the DST transaction. Suzuki had no role in the
20

21 ⁷ Id. at 83, 85, fn. 5, and 86 for all statements in this paragraph.

22 ⁸ See Id. at 86, fn. 6, and 88 for all statements in this paragraph. Jennifer Choe was Choe's colleague and daughter. Mr. McPhee found her highly credible, though her testimony supported Suzuki as much as Choe. Id. at 83.

1 1031 DST except to introduce the idea. Suzuki did not offer advice on how to structure
2 the DST.⁹ Suzuki “played a passive role.”¹⁰

3 Having made these and other factual findings, Mr. McPhee addressed Choe’s
4 claim that Suzuki was required to have a securities or real estate license. Mr. McPhee
5 summarized his findings that Suzuki was originally asked to help find a buyer, then
6 began working to become a manager (which was “not broker services”) and introduced
7 Mr. Uhm (which was “not broker services”). While Suzuki’s role as courier and his
8 hiring at one point of an attorney to be scrivener were “akin” to some of what a real
9 estate broker might do, Suzuki was not representing anyone, was acting in his own
10 interest, was not a fiduciary, and did not negotiate for anyone. And the DST purchase
11 was “between Choe and Uhm.”¹¹ Based on these facts, Mr. McPhee found that Suzuki
12 did not engage in activities that required a real estate or securities license. Mr. McPhee
13 also found that Suzuki was not a securities broker under Cal. Corp. Code § 25004(5) and
14 that the securities aspect of the Mattox transaction was incidental to the deal as a whole
15 and was negotiated by attorneys.¹²

16 **Choe repeated his affirmative defense in a motion for reconsideration, which**
17 **Mr. McPhee denied.**

18 Choe moved for reconsideration. He argued that Suzuki did recommend the DST
19 transaction and did engage in brokering activities in the Mattox transaction.¹³ Mr.

20 ⁹ See Id. at 88 for all statements in this paragraph.

21 ¹⁰ Id. at 106.

22 ¹¹ See Id. at 90-91 for all statements in this paragraph.

¹² See Dkt. 1-1 at 91 for all statements in this paragraph.

¹³ Dkt. 1-1 95-97 (Exhibit F).

1 McPhee explained that based on the evidence he “made findings different than urged
 2 by Choe” and affirmed his own findings.¹⁴ Choe also argued that Mr. McPhee
 3 manifestly disregarded relevant law requiring Suzuki to have either a real estate or
 4 securities license, particularly the law requiring a license for anyone who sells a
 5 “business opportunity.” Choe also made the related public policy argument now
 6 featured in his motion to vacate.¹⁵ Mr. McPhee acknowledged his previous
 7 consideration and reconsideration of the authorities cited by Choe. He determined that
 8 whether the Mattox transaction is viewed as a sale of real estate sale, a business
 9 opportunity, or securities, the result is the same because Suzuki was not a broker. With
 10 respect to Choe’s DST purchase, Mc. McPhee affirmed his factual findings that Suzuki,
 11 after introducing Choe and Mr. Uhm, Suzuki was passive and Uhm was the broker.”¹⁶

12 **Suzuki requests fees and costs for this proceeding.**

13 The Consulting Agreement allows for entry of judgment on an arbitration award
 14 and requires an award of prevailing party fees and costs.¹⁷

15 **III. ISSUE PRESENTED**

16 This Court must not second guess Mr. McPhee’s factual findings, but that is
 17 exactly what Mr. Choe asks it to do. Should the Court deny Mr. Choe’s motion and
 18 confirm the arbitration award?

19 _____

20 ¹⁴ Id. at 106 (Exhibit H).

¹⁵ Id. at 97-101 (Exhibit F).

¹⁶ Id. at 106-107.

21 ¹⁷ Dkt. 1-1 at 6 (Exhibit A) and at 91 (Item 4).

IV. ARGUMENT AND AUTHORITIES

A. This Court must confirm the arbitration award unless Choe shows that the award “manifestly disregarded the law” or was “completely irrational.”

The Federal Arbitration Act (FAA) provides that if a party requests confirmation of an arbitration award a court “must grant such an order unless the award is vacated...as prescribed in sections 10 and 11 of this title.” 9 U.S.C. § 9. Choe relies on only Section 10(a)(4), which allows vacatur “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” Confirmation is required “even in the face of erroneous findings of fact or misinterpretations of law.” *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)(citing *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir.1986)). “Even a serious error” is not sufficient to vacate an arbitration award. *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012). Instead, Section 10(a)(4) only applies where an award is “completely irrational” or “manifestly disregards the law.” *Id.* (citing *French*, 784 F.2d at 906; *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1059–60 (9th Cir.1991); *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1105–06 (9th Cir.2003)). Section 10(a)(4) “afford[s] an extremely limited review authority” for the district courts. *Id.* at 998.

B. Choe has not demonstrated that Mr. McPhee manifestly disregarded the law regarding real estate brokers.

A “real estate broker” is someone who for compensation from another:

Sells or offers to sell, buys or offers to buy, solicits prospective sellers or buyers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity.

1 Cal. Bus. & Prof. Code § 10131(a). A “real estate broker” is also someone who:

2 issues or sells, solicits prospective sellers or purchasers of, solicits or
3 obtains listings of, or negotiates the purchase, sale or exchange of
securities.

4 Cal. Bus. & Prof. Code § 10131.3. A “business opportunity” includes “the sale...of the
5 business and goodwill of an existing business enterprise or opportunity.” Cal. Bus. &
6 Prof. Code § 10030. This includes the “transfer of the ownership of an entire ongoing
7 business in corporate form whether by transfer of all the stock or all the assets. *All*
8 *Points Traders, Inc. v. Barrington Assocs.*, 211 Cal. App. 3d 723, 731, 259 Cal. Rptr. 780, 784
9 (Ct. App. 1989).

10 Acting as a “finder” who introduces buyer and seller does not make one a real
11 estate broker. *Stoll v. Mallory*, 173 Cal.App.2d 694, 699 (9159)(citing *Freeman v. Jergins*,
12 125 Cal.App.2d 536 (1954)). The difference between a finder and a real estate broker is
13 that a finder does not negotiate the transaction. *See Freeman*, 125 Cal.App. 2d 536
14 (allowing a commission to the finder where the negotiation was left to the buyer and
15 seller); *Lyons v. Stevenson*, 65 Cal.App.3d 595, 596, 135 Cal.Rptr. 457 (Ct. App.
16 1977)(allowing commission to a finder or “middleman”); *Anderson v. Thecher*, 76
17 Cal.App.2d 50 (1946)(a person whose duty is to bring people together is not an agent).
18 Additionally, where a contract calls for some services that require a real estate license
19 and some that do not, it is not appropriate to deny payment under the contract even if
20 the party seeking payment does not have a real estate broker license. *Venturi & Co. LLC*
21 *v. Pac. Malibu Dev. Corp.*, 172 Cal. App. 4th 1417, 1422, 92 Cal. Rptr. 3d 123, 128 (2009).

1 Choe's argument in this Court is that Suzuki acted as a real estate broker and
2 because he was not licensed as a broker, he cannot be paid. Choe's argument is
3 inadequate to demonstrate a manifest disregard of the law because it is based on a
4 factual disagreement with Mr. McPhee. The first factor that Choe alleges made Suzuki a
5 "broker" is that "the Arbitrator notes that Terry has stated that he negotiated with Choe
6 during the course of defining the terms of the asset sale." Motion at 10:15 (repeated
7 again at 10:22). That is not correct. Mr. McPhee mentioned a stray use of the word
8 "negotiated" in a note made by Suzuki to try to make sense of Choe's incredible
9 "professed belief" that Suzuki was representing Mattox.¹⁸ Reading the Interim Award
10 as a whole, Mr. McPhee clearly and repeatedly found that Suzuki did not negotiate on
11 anyone's behalf. The next and only other factor that Choe believes makes Suzuki a
12 broker is that Mr. McPhee supposedly "concedes that Terry's activities in the PMI sale,
13 including acting as a courier of information between buyer and seller and hiring an
14 attorney to prepare term sheets, are the type that a real estate broker would perform."
15 Motion at 10:18. Again, this is a selective and misconstrued reading of the Interim
16 Award. The paragraph Choe's argument draws from states that while Suzuki's courier
17 tasks and his hiring of a scribe were "akin" to activities performed by a real estate
18 broker, but the bulk of his activities were explicitly "not broker services," his "activities

19
20 ¹⁸ Dkt. 1-1 at 86.

1 did not create a fiduciary relationship,” he was “acting in his own interest,” and the
2 parties knew he was no one’s negotiator.¹⁹

3 Choe makes it abundantly clear that his motion is actually based on a
4 disagreement with Mr. McPhee’s factual findings by characterizing Mr. McPhee’s
5 findings as “unfounded” (Motion at 10:20-25) and filing hundreds of pages of exhibits
6 that are not part of Mr. McPhee’s findings. This Court must accept, and cannot review,
7 the arbitrator’s findings. And based on those findings the Corrected Final Award is not
8 manifestly contrary to the law. To maintain the appearance of a legal, rather than a
9 factual challenge, Choe faults Mr. McPhee for not citing and analyzing more case law in
10 his Interim Award. Motion at 10:26-27. But Choe has not cited a single case that presents
11 facts like this one and comes to a different legal conclusion than Mr. McPhee. Hence,
12 there is no basis to find that Mr. McPhee made even a minor legal error.

13 Choe argues that Mr. McPhee ignored the definition of “business opportunity.”
14 Motion at 11:1-9. This is untrue. The Decision on Reconsideration explicitly
15 acknowledged that Mr. McPhee had considered and reconsidered the law regarding
16 business opportunities and found that Suzuki simply did not broker the Mattox, no
17 matter how that transaction is characterized.²⁰

18
19 ¹⁹ Dkt. 1-1 at 90-91.

20 ²⁰ Dkt. 1-1 at 106-107.

C. Choe has not demonstrated that Mr. McPhee manifestly disregarded the law regarding securities broker dealers.

A “broker dealer” is a person “engaged in the business of effecting transactions in securities in [California] for the account of others or for his own account.” Cal. Corp. Code § 25004. A broker dealer must have a securities license. § 25210. There are several exceptions to this licensing requirement. A license is not required for a person who “has no place of business in this state if that person effects transactions in this state exclusively with (A) the issuers of the securities involved in the transactions of (B) other broker dealers.” Cal. Corp. Code § 25004(5).²¹ A license is not required where the sale of securities is incidental to a sale of other property. *Weber v. Jorgenson*, 16 Cal.App.3d 74, 78, 93 Cal.Rptr. 668 (1971). The seller in *Weber* refused to pay a finder’s commission for the sale of resort properties because the sale took the form of a sale of stock in a holding company and the finder did not have a securities license. The Court demanded the commission be paid, noting that the rules denying payment to parties to purportedly illegal contracts are subject to a wide range of exceptions. “In each case, the grant or refusal of relief depends upon the public interest involved in the particular kind of illegality, including the policy of the transgressed law.” *Id.*, at 85. In *Weber*, the sale of stock was simply incident to the property sale. Additionally, it was a single, isolated transaction, so enforcing the securities license requirement would have been inconsistent with the statute defining “broker” as one engaged “in the *business* of

²¹ A securities license is not required for a person who “has no place of business in this state if that person effects transactions in this state exclusively with (A) the issuers of the securities involved in the transactions of (B) other broker dealers.”

1 selling, offering for sale, or negotiating for the sale of...any security.” *Id.* (emphasis in
2 original). Further, the stock sale was handled by an attorney, so the public policy of
3 supplying buyers and sellers with adequate representation had not been offended.

4 Choe alleges Suzuki acted as broker dealer in the Choe/Mattox transaction
5 because Choe obtained an interest in the LLC that became the owner of the purchased
6 assets and that Suzuki brokered Choe’s purchase of the DST shares.

7 With respect to the Choe/Mattox sale, *Weber* is highly instructive. As in *Weber*,
8 the transaction was for assets. The transfer of a minority share in an LLC was incidental.
9 *See also Lyons*, 65 Cal. App. 3d at 596. The Choe/Mattox transaction was also an isolated
10 transaction and the transfer of securities was handled by attorneys. Suzuki didn’t
11 negotiate the deal. And Mr. McPhee also found Suzuki fit the exception in § 25004(5).
12 Given these facts, which cannot be second-guessed, Mr. McPhee had ample reason to
13 determine that Suzuki was not a securities broker dealer in the Choe/Mattox asset sale.

14 As for Choe’s purchase of DST shares, Choe says Mr. McPhee “acknowledge[ed]
15 that Terry acted as an active finder of investor Choe in the DST transaction, and that
16 Terry advised Choe to purchase the Inland Texas Healthcare DST.” Motion at 12:7-8.
17 That is simply not true, Mr. McPhee made no such findings. He found that the idea of
18 purchasing DST shares came up in Choe’s second meeting with his broker Dan Uhm
19 and, Suzuki was “passive” with respect to the transaction, and Uhm was the broker.
20 Choe’s motion tries to nit-pick the Interim Award for inconsistencies over Suzuki’s
21 proximity to Choe’s purchase of share in a DST. Motion at 12:14-13:2. But this is more
22 factual quibbling that this Court has no authority to entertain.

D. There is no clear authority for application of a public policy exception to the FAA's demand for confirmation of arbitration awards.

Choe's motion says there is also an exception to the FAA's demand for confirmation of arbitration awards where an award violates public policy. Motion at 8 (citing *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989)(which did not apply the public policy exception)). But the "public policy exception" was created under the Labor Management Relations Act (LMRA), which allows for district court review of labor arbitrations, not under the FAA. See *Golden v. O'Melveny & Myers LLP*, 2019 WL 5693760 at *9 (C.D. Cal. Nov. 1, 2019). The FAA is a "different statutory scheme" than the LMRA. *Id.* In 2008, the Supreme Court held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). When confronted with another judicially-created exception to the FAA in 2019, the Supreme Court noted that Congress designed Section 10 of the FAA "in a specific way, and it is not our proper role to redesign the statute." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Given this authority, it is unclear whether the "public policy exception" is available in the Ninth Circuit in cases under the FAA. *Golden*, at *9.

E. The "Public Policy Exception" is extremely narrow.

The "public policy exception" requires the party seeking vacatur to demonstrate that: "(1) an explicit, well defined, and dominant policy exists and (2) that the policy is one that specifically militates against the relief ordered by the arbitrator." *Golden*, at

*9(citing *Fund Raising, Inc. v. Alaskans for Clean Water, Inc.*, 2012 WL 2456255, at *2 (C.D. Cal. June 26, 2012)). In considering a public policy argument, a court cannot revisit the factual findings of the arbitrator. *Stead*, 886 F.2d at 1211; *Aramark Facility Servs. v. Serv. Employees Int'l Union, Local 1877, AFL CIO*, 530 F.3d 817, 823 (9th Cir. 2008) (“The public policy inquiry proceeds by taking the facts as found by the arbitrator”). In *DeMartini v. Johns*, 693 F.App’x 534 (9th Cir. 2017), cited by Choe, the party who lost at arbitration argued that the award should be vacated because the prevailing party had engaged in perjury and the public policy against perjury was clear. The Court agreed that there is a public policy against perjury, but found that it would have to overrule the arbitrator’s factual findings to find that perjury occurred, which it had no authority to do.

F. Choe’s attempt to demonstrate a public policy violation fails for the same reasons as his arguments about manifest disregard of the law.

Choe’s argument is that Mr. McPhee’s award violates a public policy against paying unlicensed people for work that requires a securities broker dealer license or a real estate broker license. This argument requires Choe to prove that there is an explicit, well defined, and dominant policy against paying unlicensed people. This he cannot do given the many exceptions to the general rules requiring licensing for people involved in real estate, business opportunity, and securities transactions. *See* authorities cited above including *Stoll*; *Freeman*; *Lyons*; *Venturi*; *Anderson*; Cal. Bus & Prof. Code § 25004(5); and *Weber*.

Even if Choe could demonstrate a sufficient public policy, he would also have to demonstrate that Suzuki did in fact act engage in unlicensed brokering of some kind.

1 This he cannot do without asking the Court to overturn Mr. McPhee's factual findings.
 2 Hence, he argument fails for the same reason as the public policy argument failed in
 3 *DeMartini*.

4 **G. Suzuki is entitled to an award of attorney fees and costs.**

5 Suzuki is seeking an order from this Court confirming Mr. McPhee's Final
 6 Award. Because the parties' Consulting Agreement requires an award of prevailing
 7 party attorney fees and costs and because this lawsuit has materially increased Suzuki's
 8 fees and costs, Suzuki is entitled to an award of fees and costs from this Court.

9 **V. CONCLUSION**

10 Suzuki respectfully requests an order (1) confirming Mr. McPhee's Corrected
 11 Final Award, (2) denying Choe's motion to vacate, (3) declaring Suzuki the prevailing
 12 party in this action, and (4) awarding him his fees and costs for this action in an amount
 13 to be established. Suzuki will then promptly file a fee petition so this Court can enter a
 14 final judgment disposing of this case.

15 Dated August 21, 2020.

16 CFL LAW GROUP, LLP

17 By: /s/ Jack M. Lovejoy

18 Jack M. Lovejoy, WSBA No. 36962
 19 CFL LAW GROUP, LLP
 1001 Fourth Avenue, Suite 3900
 20 Seattle, Washington 98154
 (206) 292-8800 phone
 E-mail: jlovejoy@correronin.com

21 *Attorney for Respondent/Counter-Plaintiff Terry Suzuki*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

The undersigned certifies that on August 21, 2020, I electronically filed the foregoing with Clerk of the Court utilizing the ECF Court's system which will send notification of filings to all registered e-service recipients.

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED at Port Orchard, Washington, on August 21, 2020.

By: s/ Irina Kinyon

Irina Kinyon, PP
Paralegal
ikinyon@corrchronin.com